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MISTAKE—RESCISSION—MEANING OF THE WORD "MUTUAL."—In Frazier *et al.*, v. State Bank of Decatur,[1] the defendants were members of the board of directors of a corporation. The note of the corporation payable to the order of the plaintiff fell due. The plaintiff agreed to a renewal of the note, provided the directors would execute in their individual capacities, and accordingly sent a note reading: "We, or either of us, promise to pay," etc., for the defendants to execute. The directors erased the words "or either of us," inserted the words "as directors," executed the note and returned it to the plaintiff. On discovering the mistake, an action was brought on the original note. Recovery was allowed.

A mistake to justify rescission and the cancellation of instruments must be one occurring in the bargain itself,[2] or in transactions leading up to the bargain, the importance of which is of such magnitude that they are in reality part of the bargain itself.[3] A mistake as to a purely collateral matter will not justify rescission.[4] The plaintiff in these cases seeks to be restored to *statu quo*, to have the contract nullified—in other words, he acts in complete disaffirmance of his bargain.[5] The fact that the subject-matter of the contract is a negotiable instrument does not prevent the admission of the evidence to show that there was no contract.[6]

A mistake which justifies reformation is one which occurs, not in the bargain itself, but subsequent to the bargain; it is a mistake in reducing to writing the contract of the parties.[7] There must be a valid pre-existing contract and a mistake in giving expression to the meaning of the parties to justify reformation.[8] A mistake which justifies rescission will not justify the court in awarding reformation, nor will a mistake justifying reformation justify the court in awarding rescission.[9] The above case is in harmony with established principles.

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[1] 141 S. W. (Ark.) 941, (1911).

[2] Rupley v. Dagget, 74 Ill. 351 (1874); Goddard v. Insurance Co., 108 Mass. 56 (1871); Raffles v. Wichelhaus, 2 H. and C. 906 (1864).

[3] Broughton v. Hutt, 3 DeG. and J. 501 (1858); Griffith v. Sebastian County, 49 Ark. 24 (1886). The court in the leading case views the transaction as the sale of a chattel. It is submitted that all questions of the materiality of mistake in cases of contract are really founded on the well-known rules in Jones v. Just, 9 B. and S. 141 (1868), though these rules are but seldom cited in cases of mistake.

[4] Dambwann v. Schulting, 75 N. Y. 55 (1878).

[5] Crowe v. Lewin, 95 N. Y. 423 (1884); Webster v. Stark, 10 Lea (Tenn.) 406 (1882).

[6] Daniel, Negotiable Instruments, Fourth Ed., Vol. I, Sec. 81b.

[7] Canedy v. Marcy, 13 Gray, 373 (1859); Pitcher v. Hennessey, 48 N. Y. 415 (1872).

[8] As to the necessity of the mistake being mutual in cases of reformation, see 11 Columbia L. R. 301.

[9] A few well recognized exceptions to this rule may be found. Willes v. Yates, 44 N. Y. 525 (1871); Griswold v. Hazard, 141 U. S. 260 (1891).

The law has been somewhat unsettled in cases of rescission and reformation until recently, due not so much to the inherent difficulty of the subject as to the confusing terminology of the cases. The word "mutual" has been used to mean "common," and "reciprocal";[10] and our leading case is not exempt from this inaccuracy. A mistake which is either mutual ("mutual" used in its strict sense meaning "common") or reciprocal will justify rescission. The cases where the mistake is mutual are easyof identification,[11] but the cases where the mistake is reciprocal are not so easy to recognize and calling these mistakes "mutual" has caused much uncertainty.[12]

"A unilateral mistake, coupled with ignorance thereof by the other party, does not constitute a mutual mistake,"[13] and will not justify rescission.[14] Careful diction in the decisions will do much toward clarifying an avoidable confusion in legal phraseology.

C. A. S.

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[10] See the following articles: "Law as to Mistake of Fact in Its Effect Upon Contracts," Truman Post Young, 38 Amer. Law Rev. 384 (1904); "Mistake in Contract," Roland R. Foulke, 11 Columbia Law Rev. 197, 299 (1911).

[11] Conturier v. Hastie, 5 H. L. C. 673 (1856).

[12] Notes to Mr. Foulke's article, p. 209.

[13] "Mistake of Fact as a Ground for Affirmative Equitable Relief," Edwin H. Abbot, Jr., 23 Harvard Law Rev. 608 (1910), the most satisfactory treatment of this subject.

[14] Steinmeyer v. Schroeppel, 226 Ill. 9.